IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. [redacted] 19

UNIVERSAL INTERPRETIVE
SHUTTLE CORPORATION,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA
TRANSIT COMMISSION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT D.C. TRANSIT SYSTEM, INC.

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INDEX

TABLE OF CASES

STATUTES INVOLVED

OTHER ACTS

MISCELLANEOUS

INDEX TO APPENDICES

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QUESTIONS PRESENTED

1. Whether the Washington Metropolitan Area Transit Commission, pursuant to the Washington Metropolitan Area Transit Regulation Compact, has regulatory jurisdiction over the for-hire transportation service which Universal Interpretive Shuttle Corporation proposes to perform in the District of Columbia under a contract with the Secretary of the Interior.

2. Whether the Secretary of the Interior has the statutory authority to operate a for-hire transportation service in the District of Columbia.

3. Whether the Congressional Franchise given to D. C. Transit protects it against the for-hire transportation service which Universal Interpretive Shuttle Corporation proposes to perform in the District of Columbia under a contract with the Secretary of the Interior.

4. Whether D. C. Transit has standing to seek injunctive relief.

COUNTERSTATEMENT OF THE CASE

The Mall area of the District of Columbia, bounded from north to west by the White House, Grant Memorial, Jefferson Memorial, and the Lincoln Memorial, is a national park area under the administrative jurisdiction of the Secretary of the Interior ("Secretary"), through the National Park Service ("Service"). (Executive Order of June 10, 1933, 5 U.S.C. § 132; D.C. Code (1967 ed.) § 8-108; Act of August 8, 1953, 67 Stat. 496, 16 U.S.C. § 1c). Each year millions of visitors come to the Mall to view the many national monuments, museums, and memorials located thereon. Some 15 million visitors were expected in 1967, a figure which may grow to 35 million by 1980 (App. 89-90).

Several common carriers of passengers by motor vehicle, including D. C. Transit System, Inc. ("Transit"), have been performing sightseeing operations in the Mall area for the particular benefit of such visitors. These operations consist of lecture tours conducted by guides licensed by the District Government after a written examination of their knowledge of points of interest in the District (App. 55, 65). Such operations have been certificated by the Washington Metropolitan Area Transit Commission ("Commission") in accordance with the provisions of the Washington Metropolitan Area Transit Regulation Compact ("Compact"), approved by Act of September 15, 1960, 74 Stat. 1031, D.C. Code §§ 1-1410

to 1416, giving the Commission jurisdiction over passenger transportation for hire by motor vehicle performed in the District of Columbia and the nearby counties in Maryland and Virginia (the "Metropolitan District") (App. 55-56).

On March 17, 1967, the Department of the Interior entered into a contract with Universal Interpretive Shuttle Corporation ("Universal") for the provision of a daily, for-hire, "interpretive shuttle service" for the accommodation of visitors to the Mall (App. 67-87). Such service will be operated on several city streets outside the Mall and under the jurisdiction of the District Government, including 14th, 12th, 9th, 7th, 4th, 3rd, and 2nd streets among others, as well as on city streets within the Mall (App. 50, 63-64, 100).

Under the contract, Universal will operate "articulated trams" in both round-trip and shuttle service which will stop at 11 points of interest encompassing some 23 national monuments, memorials, museums and Federal buildings. Guides accompanying the trams will provide a continuous narration approved by the Service. Additionally, stationary guides will be provided at the 11 points of interest to furnish information to visitors whether or not they have paid for the narrated tour (App. 11-12). These guides, as well as all Universal employees coming into contact with the public, will wear uniforms identifying them as employees of Universal (App. 82).

The route to be followed by Universal will be essentially that used by the Service itself during a six-week experiment conducted in 1966 (App. 11, 21). Such route will be operated on a schedule requiring three trips per hour within the first four months of service and a minimum of twelve trips per hour within a year. Both the route and the schedule of trips are subject to final approval of the Secretary (App. 70, 71, 75).

Fares will be 25¢ per zone for a shuttle ride and 75¢ for a round trip. An all-day ticket selling for $1.00 is also con-

templated, allowing a visitor to board a tram at any stop along the route as many times as desired (App. 12, 22).

For its part, Transit provides daily sightseeing tours on both an individual and group basis, with licensed guides, which cover almost all of the 23 buildings and monuments to be featured by Universal. These tours are operated, to a substantial extent, over the same city streets to be used by Universal (App. 60, 65, 119-24). Transit also provides regular route or scheduled service over some 20 routes traversing the major Mall arteries to be used by Universal (App. 60, 117-18). It has been estimated that Transit will lose over a million dollars annually in combined sightseeing and regular-route revenues as a result of Universal's proposed operation (App. 61).

The financial arrangements between the Secretary and Universal are as follows:

> Universal supplies all the necessary capital and assumes all the risk of an operating loss (App. 68); Universal pays to the Secretary an annual franchise fee of $1,320 plus 3% of its gross receipts from the preceding year (App. 77); in return Universal gets a reasonable opportunity to make a fair profit (App. 68).

Universal has decided not to apply for certification of its proposed operation by the Commission, having been advised by the Service that such certification is not necessary (App. 52).

SUMMARY OF ARGUMENT

I. Under the Compact, any for-hire transportation of passengers by motor vehicle performed in the District of Columbia requires certification by the Commission. Congress never intended to exempt transportation performed within national park areas administered by the Secretary, through the Service, from the Commission's jurisdiction. While transportation performed by the Government is exempted from the Com-

mission's jurisdiction, the transportation in issue will not be performed by the Government.

II. The Secretary has no authority to perform the transportation in issue. With limited exceptions, the Congress has never authorized the Secretary to perform common carrier service as a governmental function.

III. Independent of the Compact, the Congressional Franchise granted to Transit prohibits a competitive service in the District of Columbia of the nature proposed by Universal without certification by the Commission. This protection applies to Transit's sightseeing service as well as its regular route service.

ARGUMENT

INTRODUCTION

In an introduction to its argument Universal suggests that the decision of the Court of Appeals has subjected the plans of the Federal Government for the preservation and enhancement of a national park area, the Mall, to the oversight of a local, parochial agency. This suggestion lacks any real substance.

First, the Commission is much more than a local agency. It is an agency whose creation required an Act of Congress suspending certain Federal laws and vesting it with Federal regulatory functions previously delegated to and exercised by the Interstate Commerce Commission ("ICC"). It is an agency whose decisions are reviewable by Federal courts and whose very establishment can be altered or repealed by the Congress.[1] These certainly are not characteristics of a local agency.

Second, the Commission will not exercise a supervisory or oversight power over the Secretary. To require a "con-

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[1] Act of September 15, 1960, 74 Stat. 1050-1, D.C. Code § 1-1412 (Pet. App. 35a-36a) and D.C. Code §§ 1-1415 and 1416 reproduced in Appendix "A" hereto.

cessioner" of the Secretary to obtain a certificate from the Commission to operate a for-hire motor carrier service is not tantamount to requiring the Secretary to obtain its approval of plans for the administration and development of a national park area in the Metropolitan District. The Secretary and only the Secretary will decide generally how the Mall should be managed. In particular, insofar as transportation operations are concerned, the Secretary and only the Secretary will decide whether all for-hire motor carriers of passengers should be allowed to enter the Mall or whether all such carriers should be excluded therefrom. As an alternative, the Secretary and only the Secretary will pick a "concessioner" to be given preferential operating rights. He may pick a carrier from the many already certificated by the Commission or he may pick a carrier that will have to seek such certification. If he picks an uncertificated carrier, he would seem to be voluntarily subjecting himself to no more oversight than he does by requiring the concessioner's equipment to meet all the safety requirements of the ICC (App. 69, 74).

Universal further suggests that the decision of the Court of Appeals is contrary to the "accommodation that Congress has expressed between the national and local interests". It would seem, however, that Congress fully intended the Commission to regulate for-hire transportation operations performed in national park areas in the Metropolitan District as an integral part of such accommodation. In the Preamble to the Compact, Congress specifically declared:

> Whereas said compact adequately protects the *national* interest in mass transit service in the metropolitan area of the Nation's Capital and *properly accommodates* the *National* and State interests in and obligations toward mass transit in the metropolitan area . . . . (D.C. Code § 1-1410, Pet. App. 10a; emphasis added.)

In the final analysis, the decision of the Court of Appeals merely recognizes a Congressional intent that a Congressionally-established commission charged with improving transit

service in the entire Metropolitan District should discharge such function in the heartland of the District where transit service is particularly necessary for the accommodation of millions of visitors.

I

PURSUANT TO THE COMPACT, THE COMMISSION HAS REGULATORY JURISDICTION OVER THE FOR-HIRE TRANSPORTATION OPERATION WHICH UNIVERSAL PROPOSES TO PERFORM IN THE DISTRICT OF COLUMBIA UNDER A CONTRACT WITH THE SECRETARY.

A. The Commission's Jurisdiction Extends to For-hire Transportation Operations Performed in Whole or in Part on Federal Property Within the Metropolitan District.

Universal first argues that the Commission has no jurisdiction over its proposed operation on the Mall because the Secretary, pursuant to several statutes enacted prior to the Compact, has been given an "exclusive" control thereover which has not been altered by enactment of the Compact. This argument is based upon the premise that the ICC and the Public Utilities Commission of the District of Columbia (PUC), two of the four predecessors of the Commission, never possessed any authority which modified such "exclusive" control. As will be discussed below, the Secretary did have "exclusive" control over national park areas, including the Mall, until legislation in the 1930's gave the ICC and PUC certain regulatory authority over for-hire motor carrier operations performed thereon. With the enactment of the Compact such authority was incorporated into the Commission's overall responsibility to improve transit and alleviate traffic congestion within the Metropolitan District "on a coordinated basis, without regard to political boundaries" (Compact, Article II, Pet. App. 11a).

This jurisdictional question can best be discussed by a chronological analysis of the pertinent statutes. By the Act

of July 1, 1898, 30 Stat. 570, D.C. Code § 8-108 (Pet App. 1a), Congress gave the Secretary, through predecessors of the Service, "exclusive charge and control" of park areas in the District of Columbia. Such grant of authority was not unique to the national parks in the District of Columbia, however. Around the same period the Secretary was similarly granted "exclusive control" over several other park areas throughout the country, including Sequoia National Park, Mount Rainier National Park, Wind Cave National Park, Mesa Verde National Park, and Glacier National Park.[2]

By the Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. §§ 1-3 (Pet. App. 2a-3a), the Service was established to provide, under the Secretary's direction, for the "supervision, management, and control" of the national park system. Later, by the Act of May 26, 1930, 46 Stat. 382, 16 U.S.C. § 17b (Pet. App. 3a), the Secretary was authorized "to contract for services or other accommodations" provided in the national parks.

At this point in time Universal, pursuant to the Secretary's "exclusive" control over national parks and his authority "to contract for services", certainly could have performed the operation in issue and been subject to only the Secretary's regulation. However, legislation was passed in 1931, 1935, and 1960 which has qualified the Secretary's "exclusive" jurisdiction insofar as for-hire operations of motor carriers of passengers are concerned.

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[2]The Secretary's jurisdiction over these five parks is derived from the following enactments, pertinent portions of which are reproduced in Appendix "A" hereto: Sequoia National Park, Act of September 25, 1890, 26 Stat. 478, 16 U.S.C. § 43; Mount Rainier National Park, Act of March 2, 1899, 30 Stat. 994, 16 U.S.C. § 92; Wind Cave National Park, Act of January 9, 1903, 32 Stat. 765, 16 U.S.C. § 142; Mesa Verde National Park, Act of June 29, 1906, 34 Stat. 617, 16 U.S.C. § 112; Glacier National Park, Act of May 11, 1910, 36 Stat. 354, 16 U.S.C. § 162.

The Act of February 27, 1931, 46 Stat. 1424, 1426, D.C. Code § 40-603(e) (reproduced in Appendix "A" hereto), provided in part as follows:

> That as to all common carriers by vehicle which enter, operate in, or leave the District of Columbia, the power to route such vehicles within the District. . . , to regulate their schedules. . . , to locate their stops . . . is vested in the (PUC).

Pursuant to this authority the PUC regulated all routes of Transit's predecessor which traversed the Mall. As an example thereof, PUC Order No. 1623, dated August 5, 1937 (reproduced as Appendix "B" hereto), granted the following route authority:

> Capital Transit Company be and it is authorized and directed to operate buses over the following route: From terminal on the south side of P Street, Southwest, east on P Street to 4th Street, *north on 4th Street to Washington Drive, west on said Drive to 9th Street,* north on 9th Street to Pennsylvania Avenue . . . (The five-block Washington Drive portion of this route for which the emphasis has been added is entirely in the Mall.)

With the enactment of Part II of the Interstate Commerce Act, Act of August 9, 1935, 49 Stat. 543, 49 U.S.C. § 301 et seq., a further limitation was placed on the once "exclusive" character of the Secretary's jurisdiction over national parks throughout the country. Section 203(b)(4) of this Act, 49 U.S.C. § 303(b)(4) (reproduced in Appendix "A" hereto), provides that:

> . . . the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments.

In accordance with this Congressional directive, in *Motor Carrier Safety Regulations - Exemptions*, 10 M.C.C. 533, 538 (1938), the ICC applied its safety regulations to motor carrier operations performed in the national parks. Furthermore, the ICC has even exercised economic jurisdiction over motor carriers operating in national parks consistent with and subject to the statutory authority of the Secretary. See, for example, *Smoky Mountain Tours Company Common Carrier Application*, 10 M.C.C. 127 (1938), and *Huff Common Carrier Application*, 27 M.C.C. 643 (1941).

Next we come to the statute which lies at the very core of this controversy, the Act of September 15, 1960, 74 Stat. 1031, D.C. Code § 1-1410 et seq., approving the Compact. Before considering the effect this legislation had on the jurisdiction of the Secretary over national parks, it is helpful to bear in mind the primary objective of the Compact.

Prior to 1960 four separate agencies regulated for-hire motor transportation performed in the Metropolitan District—the ICC, PUC, and State commissions in Maryland and Virginia. The Compact was intended to centralize the regulatory responsibilities of these four agencies in a single agency, the Commission, and thereby substitute a comprehensive system of regulation for fragmentary or piecemeal regulation.[3] The United States Court of Appeals for the District of Columbia Circuit has described this regulatory scheme as follows:

> When Congress consented to the Compact in 1960, it elected to treat the metropolitan area of Washington as a geographical unit, with the Commission as the central licensing and rate-making authority. No one could engage in the transportation covered by the Compact except upon its terms; and these in-

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[3] House Report No. 1621 of the 86th Congress, 2d Session, accompanying H.J. Res. 402 (May 18, 1960), pp. 6-7.

cluded the issuance by the Commission of a certificate of public convenience and necessity.[4]

Turning now to a consideration of the impact of the Act of 1960 on the Secretary's jurisdiction over national parks, Section 3 thereof, 74 Stat. 1050, D.C. Code § 1-1412 (Pet. App. 35a), provides in part as follows:

> [N]othing in this Act or in the Compact shall affect the normal and ordinary police powers of the signatories and of the political subdivisions thereof and of the Director of the National Park Service with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities.

Although the legislative history of the Compact is silent as to the congressional intent underlying this language of the second proviso of Section 3, such intent can be reasonably deduced.

First, if, as contended by Universal, the Congress thereby intended to exclude from the Commission's jurisdiction national parks under the authority of the Secretary, it surely would have used plain language to this effect. The language used, however, is not descriptive of such authority.[5] Rather, it is descriptive only of the limited traffic or police authority which the signatory states of Maryland and Virginia, and even their political subdivisions, were allowed to retain over

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[4] *D. C. Transit System, Inc. v. Washington Met. Area Tr. Com'n.*, U.S. App. D.C. __, 376 F.2d 765, 767, cert. denied, 389 U.S. 847.

[5] The Department of the Interior underscored this fact in its legislative comments on the Compact prior to its enactment, noting that "police powers is not a term descriptive of the authority and responsibilities of the Director of the National Park Service" (House Report No. 1621, *supra*, p. 49). Cf. Section 209(a) of the Interstate Commerce Act, 49 U.S.C. § 309(a) (reproduced in Appendix "A" hereto), where specific reference is made to the "Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior".

for-hire motor carriers of passengers subject to the Commission's comprehensive regulation.

In this connection the Interior Department recommended the following amendment to Section 3 which would have specifically referred to the statutory authority under which the Secretary administers the national park system:

> [N]othing in this Act or in the Compact shall affect the authority and responsibility of the Secretary of the Interior pursuant to Section 3 of the Act of August 25, 1916, as amended, and other Acts of Congress controlling the development and use of national parks, monuments, and reservations comprising the National Park System. House Report No. 1621, *supra*, p. 49.

The very failure of the Congress to enact such a broad exception to the Commission's jurisdiction strongly indicates an intent to include national parks in the Metropolitan District within the purview of the Commission's jurisdiction.[6]

Second, the language of the second proviso of Section 3 must be construed in conjunction with other provisions in Section 3. The last sentence thereof provides:

> Notwithstanding any provision of this section to the contrary, the jurisdiction of the Public Utilities Commission of the District of Columbia and of the Interstate Commerce Commission over all carriers and persons subject to the provisions of the Washington Metropolitan Area Transit Regulation Compact are hereby transferred, as and to the extent provided therein, to the Washington Metropolitan Area Transit Commission.

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[6] As no mention of such recommendation is made by the House Judiciary Committee in its report on H.J. Res. 402, it cannot be said with certainty that the Committee rejected the matter for the reason that it intended the Compact to apply to national park areas. Such explanation would, under the circumstances, seem more reasonable than the alternative suggested by Universal that the Committee dismissed such an amendment as an unnecessary refinement.

Such provision surely indicates that the regulatory authority which the predecessors of the Commission exercised over operations of for-hire motor carriers performed in national parks in the Metropolitan District has been vested, during the life of the Compact, in the Commission.[7]

Third, the Compact itself specifies the type of operations that are intended to be excepted from the Commission's jurisdiction. Five such operations are enumerated in Section 1(a) of Article XII (Pet. App. 18a). None of these specific exceptions applies to operations performed by for-hire motor carriers in park areas. By comparison, see Section 203 (b)(4) of the Interstate Commerce Act, 49 U.S.C. § 303(b) (4), reproduced in Appendix "A" hereto.

Fourth, it would have been entirely inconsistent for the Congress to have authorized the Commission, under Article II of the Compact, to regulate "on a coordinated basis without regard to political boundaries within the Metropolitan District" and then to have established such a political boundary over national parks.

Finally, from a practical standpoint, if the Congress intended the Commission to discharge effectively its responsibilities under Article II of the Compact to improve transit operations and alleviate traffic congestion within the Metropolitan District, it must surely have intended to give the Commission jurisdiction over the very heart of the District, the Mall, where literally millions of visitors are drawn each year.

No Congressional enactment since the approval of the Compact in 1960 has in anyway altered the Commission's

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[7] In this connection, Section 21 of Article XII of the Compact provides that all outstanding rules, regulations and orders of the ICC and PUC with respect to transportation of persons subject to the Compact shall remain in effect and be enforceable as though they had been prescribed or issued by the Commission, "unless and until otherwise provided by such Commission in the exercise of its powers under this Act".

regulatory jurisdiction over for-hire transportation in the District of Columbia. The Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. § 20, heavily relied on by Universal, neither gave the Secretary any new authority nor took any authority from the Commission. The principle purpose of such legislation was merely to put into statutory form policies which generally had been followed by the Service in contracting for concessions within the national parks.[8]

As noted by the Department of Justice on page 13 of its appellate brief in this proceeding:

> It is not necessary to find a grant of authority in the Act of October 9, 1965. . . That statute was enacted not as a grant of authority to the Secretary to contract with concessionaires (an authority he had traditionally exercised under the pre-existing provisions of 16 U.S.C. sec. 17b) but to encourage a greater use of concessionaires by specifically authorizing the execution of contracts containing provisions advantageous to the concessionaires . . . Thus, the 1965 Act has no direct application to the congressional intent on the main issue, i.e., the alleged transfer of authority to the Washington Metropolitan Area Transit Commission in 1960.

Upon analysis of all the statutes involved, it is reasonably clear that notwithstanding the Secretary's broad administrative authority over national parks areas in the Metropolitan District, including his unquestioned authority to contract for the operation of for-hire transportation services thereon, the Congress intended the regulatory requirements of the Compact to extend to for-hire transportation operations performed in all areas of the Metropolitan District, including national parks.

It should be emphasized that the foregoing discussion has assumed that the operation proposed by Universal will be

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[8] 1965 U.S. Code Cong. and Adm. News, p. 3489, citing Senate Report No. 765, 89th Congress, 1st Session, accompanying H.R. 2901 (September 22, 1965).

performed entirely on the Mall. This is not the case, however. Universal's proposed operation will cross several streets which are outside park grounds and subject to the police jurisdiction of the D. C. Government (App. 50, 63-64, 100). Accordingly, even if the Commission has no authority to regulate Universal's operations on the Mall, it clearly has authority to regulate such operations on city streets outside the Mall.

In this connection, the Trial Court found that D.C. Code § 8-144 (Pet. App. 1a) authorized "the passage by Park authorities over the D. C. public streets for purposes of going from one section of Park land to another". While this may be true, it certainly does not vest ultimate control over such streets in the Director of the Service or authorize passage thereover by a concessioner of the Director without a certificate from the Commission.

For its part Universal relies on D.C. Code § 8-135 (Pet. App. 1a) in attempting to play down the fact that its proposed service will be operated over several streets outside the Mall and under the jurisdiction of the D. C. Government. Under this code provision jurisdiction over public lands may be transferred from the D. C. Government to the Director of the Service, or vice versa, pursuant to "mutual" legal agreement. On page 11 Universal suggests that arrangements for such a transfer of jurisdiction are now being made with respect to the several city streets outside the Mall which will be used in its operation. As of this date, no such transfer has been made and there is nothing to indicate that the D. C. Government is "mutually" agreeable thereto.

Several statements by Universal warrant passing comment. On pages 18, 19, and 24, Universal cites a proviso to the D. C. Traffic Act of 1925 as affirming the "exclusive" jurisdiction of the Secretary over national parks in the District of Columbia. Quite the contrary, this proviso affords a good example of how such "exclusive" jurisdiction was qualified by authority vested in the PUC.

By the Traffic Act of 1925, Congress provided for the regulation of motor vehicle traffic in the District of Columbia by a Director of Traffic. Incorporated into the scheme of regulation was a proviso to protect the jurisdiction of the Chief of Engineers, later transferred to the Service, over vehicular traffic in park areas. This proviso read as follows:

> Nothing contained in this Act shall be construed to interfere with the exclusive charge and control *heretofore committed* to the Chief of Engineers over the park system of the District, and he is hereby authorized and empowered to make and enforce all regulations for the control of vehicles and traffic, and limiting the speed thereof on roads, highways, and bridges within the public grounds in the District, under his control. (Act of March 3, 1925, 43 Stat. 1119, 1126 D.C. Code § 40-613; emphasis added.)

By the Act of February 27, 1931, 46 Stat. 1424, 1426, D.C. Code § 40-603(e), the Congress authorized the PUC to regulate bus operations in the District but did not update the proviso in the Act of 1925 to exclude park areas from the PUC's jurisdiction. Recognition of such fact is readily found in D.C. Code § 40-613, reproduced in Appendix "A" hereto, wherein the "heretofore committed" language of the proviso in the Act of 1925 has been codified as "prior to March 3, 1925, committed".

In short after the Act of 1931 the Chief of Engineers, and later the Service, had exclusive charge and control over park areas in the District insofar as the jurisdiction of the Director of Traffic was concerned but not insofar as the jurisdiction of the PUC was concerned. With the enactment of the Compact the Congress clearly transferred the PUC's jurisdiction over park areas to the Commission.

On pages 22 and 23 Universal cites several cases upholding the exclusive right of Congress to control public lands of the United States, which right may be exercised through broad authority delegated to the Secretary. No one questions such principle. Rather, it is being contended that the Congress has seen fit to delegate certain authority over mo-

tor carrier operations in national park areas to the PUC, ICC, and the Commission in lieu of delegating "exclusive" control over such areas to the Secretary.

On pages 26 and 27 Universal contends that the Secretary has acquiesced in the PUC's and Commission's past assertions of jurisdiction over buses and taxis operating in the Mall but has not abdicated any of his "exclusive" jurisdiction thereover. Accordingly, it is contended that the Secretary "has determined that to fulfill his statutory duties he alone must regulate" Universal's proposed operation. The trouble with this contention is that only the Congress, and not the Secretary, can properly determine whether the PUC and the Commission should exercise certain jurisdiction over national park areas concurrently with the Secretary.

On pages 27-32 Universal goes to great lengths to prove that the statutes under which the Secretary administers the national parks were not "suspended" by the enactment of the Compact. No such outright suspension was deemed necessary because the statutes administered by the Secretary do not fundamentally relate to the transportation embraced by the Compact. However, this does not mean that park areas administered by the Secretary were in no way affected by the enactment of the Compact. As discussed hereinabove, the application of the Compact to such park areas is rooted not in the suspension of the Secretary's statutory authority but in the suspension and transfer to the Commission of the regulatory authority of the ICC and PUC existing prior to the enactment of the Compact.

On pages 32-33 Universal argues that the failure of Congress to adopt the amendment to the second proviso to Section 3 of the consent legislation recommended by the Secretary is "at least equally consistent with the conclusion that Congress believed the amendment was unnecessary". This argument might be valid if considered in the abstract. When considered in the light of the sharply contrasting language of the provisos to the Traffic Act of 1925 and the Interstate Commerce Act, the pre-existing delegations of

authority over motor carrier operations in park areas to the PUC and ICC, and of the purpose of Congress in enacting the Compact to centralize all regulatory responsibilities in a single agency and thereby remove all political boundaries within the Metropolitan District, the Congressional intent in failing to adopt the Secretary's recommendation becomes reasonably certain.

On page 34 Universal suggests the term "police powers" used in Section 3 of the consent legislation should be interpreted to include the full scope of the Secretary's pre-existing authority. This is exactly what Transit has been arguing all along—that the language of Section 3 was intended to preserve authority that had been non-"exclusive" in nature since 1931.

On pages 35-36 and 38 Universal paints a picture of "intolerable, irreconcilable conflicts" between the Commission and the Secretary. Such picture is completely misleading. In practice when two agencies administering separate laws have jurisdiction concurrent in nature requiring them to grant dual approval to certain operations, a comity generally exists which enables the agencies to discharge their fundamental responsibilities in a spirit of cooperation not frustration. For example, a dual jurisdiction now exists under the Compact whereby both the Commission and the ICC regulate such matters as safety, insurance, accounting, borrowing, and consolidations. The Congress was not concerned that any real conflicts would materialize from such dual regulation and none have. There is absolutely no reason to believe that the Congress was concerned that the Commission and the Service would be unable to establish a similar comity of regulations.[9]

Also on page 36 Universal contends that the Act of 1960 by which Congress consented to the Compact was not

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[9] The comity of regulations established between the ICC and the Secretary was described in *Motor Carrier Safety Regulations - Exemptions*, 10 M.C.C. 533, 538.

"affirmative legislation". To the contrary, the affirmative nature of the consent legislation was aptly described in House Report No. 1621, *supra*, as follows:

> In article VIII the compact recognizes that affirmative legislation by the Congress [is required] to remove Federal jurisdiction from the sphere of compact action . . . The compact, therefore, provides that it shall become effective 90 days after its adoption by the signatories and consent thereto by the Congress and the enactment by the Congress of legislation to remove the Federal jurisdiction from the area of compact activity. . . (Page 9)
>
> Section 3 of House Joint Resolution 402 [D.C. Code § 1-1412] provides for removal of Federal jurisdiction relating to or affecting transportation under the compact and to the persons engaged therein. The removal of Federal jurisdiction is by suspension of applicable laws and regulations rather than their repeal . . . (Page 19)

Moreover, the affirmative nature of the consent legislation is seen in Section 2 thereof, D.C. Code § 1-1411, which authorizes the Commissioners of the District of Columbia to enter into the compact and authorizes to be appropriated such funds as are necessary to carry out the obligations of the District of Columbia thereunder.

Finally, on pages 36-38 Universal cites *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956), as being relevant to the case at bar. The *Miller* case is readily distinguishable because it dealt with a conflict between State and Federal laws. Here, only Federal statutes are involved--the Acts administered by the Secretary and the Act approving the Compact--and there is no necessary conflict between them. Additionally, the *Miller* case is distinguishable because it involved a bona fide contractor as opposed to a concessioner like Universal, the significance of which will be discussed later.

B. The Contract Between the Secretary and Universal Contemplates the Performance of a For-hire Transportation Operation Between Points in the Metropolitan District.

Universal contends on pages 38-41 that its proposed Mall operation is not the type of "transportation" covered by Section 1 of Article XII of the Compact (Pet. App. 18a). Universal argues, first, that such operation will not be a "commuter" or "mass transit" service and, second, that such operation will not be performed "between any points" in the Metropolitan District. Universal's first argument is entirely negated by the legislative history of the Compact, the language of the Compact, and numerous court decisions affirming the Commission's jurisdiction over "non-commuter" operations. Universal's second argument is entirely negated by the facts.

To begin with, it is most difficult to understand Universal's treatment of the terms "mass transit" and "commuter" as being synonymous. *Webster's New International Dictionary*, Second Edition, Unabridged, defines the adjective "mass" as follows: "Of, pert. to, or characteristic of a mass or the masses (see 3d MASS, 6)". The reference in parentheses is to the following definition of the noun "mass": "With *the*, the general body of mankind, a race, a nation, etc.; pl., the great body of the people, as contrasted with the classes; the populace; the proletariat." The word "commuter" is defined as "one who travels back and forth between a city and an outside residence".

In other words it would appear reasonable to define "mass transit" as being synonymous with "public transit" but certainly not with "commuter" transit.

In the light of the numerous references in both the legislative history and the Compact to the words "transit" and "traffic" in general terms, it is unquestionably clear that the Congress intended the Commission to have jurisdiction over all forms of mass or public transit performed in the

Metropolitan District, including sightseeing, charter, and local service as well as interurban or commuter service. Illustrative references are as follows, the emphasis having been added:

> The function of the instant Compact is to improve *transit* service offered by the existing privately owned companies through coordinated regulation and improvement of *traffic* conditions on a regional basis. . .
>
> Under the existing regulatory arrangement, four separate commissions, each acting within its own sphere, participate in the regulation of *transit* in the metropolitan area. . .
>
> The centralization of regulatory authority in a single agency, which would be substantially achieved under the subject legislation, is an essential step in bringing about a more satisfactory *transit* service. [House Report No. 1621, 86th Congress, *supra*, pp. 6-7]
>
> The Commission shall have jurisdiction coextensive with the Metropolitan District for the regulation and improvement of *transit* and the alleviation of *traffic* congestion within the Metropolitan District on a coordinated basis, without regard to political boundaries within the Metropolitan District. [Compact, Article II]
>
> Each of the signatories pledges to each of the other signatory parties faithful cooperation in the solution and control of *transit* and *traffic* problems within the Metropolitan District . . . [Compact, Article X]

It is interesting to note in the Preamble itself that the purpose of the Compact is set forth in general terms as follows (D.C. Code § 1-1410):

> The establishment of a single organization as the common agency of the signatories to regulate *transit* and alleviate *traffic* congestion. [Emphasis added.]

Moreover, it should be emphasized that the nature of the operations intended to be covered by the Compact are set forth in Section 1(a) of Article XII in the most general terms: "transportation for hire . . . between any points in

the Metropolitan District". Certainly, if the Congress intended to limit the Commission's jurisdiction to a particular type of service, it would have said something like "commuter or interurban transportation for hire . . .". Phrased differently, if the Compact was not intended to apply to non-commuter operations performed within the District of Columbia, would the Congress not have simply exempted such operations in the same fashion that intra-Virginia transportation is exempted by Section 1(b) of Article XII?

The Commission's jurisdiction over sightseeing or charter operations, clearly non-"commuter" in nature, has been affirmed in the following decisions:

Alexandria, Barcroft & Wash. T. Co. v. Washington M.A.T. Com'n., 323 F.2d 777 (4th Cir. 1963);

Gadd v. Washington Met. Area Tr. Com'n., 121 U.S. App. D.C. 7, 347 F.2d 791 (1965);

Holiday Tours, Inc. v. Washington Met. Area Tr. Com'n., 122 U.S. App. D.C. 96, 352 F.2d 672 (1965);

D. C. Transit System, Inc. v. Washington Met. Area Tr. Com'n., 366 F.2d 542 (4th Cir. 1966).

In passing it seems beyond dispute that transportation services to be made available to 15,000,000 annual visitors to the Mall Area would be characterized as "mass transit" services.

Universal also contends that it will not operate "between any points" in the District, quoting language from Section 2(a) of its contract with the Secretary (App. 71) which refers to a service "originating and terminating at the same point, with no passengers embarking or debarking enroute". From a strictly physical standpoint, it would seem that a service originating at Capitol Hill, traveling to the Lincoln Memorial, and returning to Capitol Hill is an operation "between" those two points whether or not any passenger is allowed to debark enroute. However, assuming *arguendo* the validity of Universal's contention, it is quite clear that the contract

contemplates other types of services which will be operated "between points" in the District of Columbia.

The official news release issued by the Department states that a three-zone service will be established, with a charge of 25¢ per zone, and that an all-day ticket is planned which will permit a visitor to board the tram at any stop along the route as many times as desired (App. 22). The Vice-President of Universal confirmed that, as the corporate name suggests, it would operate a shuttle service as well as provide all-day tickets (App. 12).

Can there be any dispute that a shuttle service which carries a visitor from zone 1 to zone 2 for 25¢ fare is an operation "between points"? Moreover, by permitting passengers using an all-day ticket to board as many times during the day as desired along route, Universal surely is contemplating a service which will be operated "between points" of interest in the Mall.

In view of the foregoing Universal proposes to perform an operation which is fully embraced within the description of the Commission's jurisdiction set out in Section 1(a) of Article XII of the Compact.[10] Accordingly, Universal must obtain a certificate from the Commission as required by Section 4(a) of Article XII of the Compact (Pet. App. 20a).

C. Universal and Not the Secretary Will Perform the Contemplated Transportation Operation.

Universal contends on pages 42-44 that the operation in issue will in effect be an activity of the Federal Government which is exempt from the Commission's jurisdiction under Section 1(a)(2) of Article XII of the Compact (Pet. App. 18a). Universal argues that if the Government can provide the Mall service directly and be exempt from regulation, it can provide such service indirectly through a concessioner and the Section 1(a)(2) exemption will still be applicable.

[10] Universal has not disputed that the proposed service will be "for hire" or that it will be a "carrier of persons" as those terms are used in Section 1(a).

Universal's argument ignores the clear language of Section 1(a)(2) which establishes an exemption for transportation "by" the Federal Government. The very use of the word "by" instead of the word "for" indicates that only operations actually performed by the Government itself are to be exempted from regulation.

Assuming *arguendo* that pursuant to an agency relationship a third party can perform a transportation operation for the Government and be exempted from the Commission's regulation, the contract between Universal and the Secretary negates any such relationship. The contract requires Universal to:

1. Supply all the necessary capital and assume all the operating risks (App. 68);

2. Supply all personnel and equipment necessary for the proposed operation (App. 72);

3. Pay to the Secretary an annual franchise fee of $1,320.00 (App. 77);

4. Pay to the Secretary 3% of its gross receipts from the preceding year (App. 77);

5. Supply employees coming in direct contact with the public a uniform by which they may be "known and distinguished" as Universal's employees (App. 82).

These requirements have clearly not made Universal an agent of the Secretary. It is nothing more than a "concessioner" or entrepreneur whose acts are not legally attributable to the Government.

The case cited by Universal, *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940), has no relevancy to this proceeding. It involved a bona fide "contractor" who was paid to perform certain construction services for the Government; he was not required to pay a franchise fee or to assume the operating risks of a profit-seeking venture.

The correct relationship between the Secretary and Universal is described in *United States v. Gray Line Water Tours of Charleston*, 311 F.2d 779 (4th Cir. 1962), a case in which the Secretary granted a concession to a water carrier to transport visitors to Fort Sumter, a national monument not accessible by land. As noted by the Court on page 781:

> . . . neither the necessary investment, nor the assumption of the obligations, for such a service would be forthcoming from private sources without some substantial proof of the probable success of the venture. The inducement the Government tendered to an entrepreneur took the form of a preference in the use of the pier.[11]

In view of the foregoing, it is clear that the proposed transportation service will be performed by Universal, not the Federal Government, and the exemption in Section 1(a)(2) of Article XII is not applicable.

II

THE SECRETARY OF THE INTERIOR HAS NO STATUTORY AUTHORITY TO PERFORM A FOR-HIRE TRANSPORTATION OPERATION IN THE DISTRICT OF COLUMBIA.

Universal's argument that the for-hire transportation involved herein is "transportation by the Federal Government" assumes the existence of statutory authority for the Secretary, through the Service, to perform such transportation. It is submitted that no such authority exists in the Act of 1916 establishing the Service or the subsequent enactments administered by the Service; for the performance of transportation for-hire is not generally deemed to be a governmental function.[12]

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[11] Under Section 15(a) of the contract Universal is granted a similar preference (App. 81).

[12] In the *Gray Line* case, *supra*, the Court stated on page 781 that the Secretary has authority to perform for-hire transportation services himself. Transit submits that such statement was dictum and not

None of the statutes cited by Universal, codified at 16 U.S.C. §§ 1, 1c, 2, 3, 17b, and 20a-g (Pet. App. 2a-9a), authorizes the Secretary himself to operate any for-hire transportation services. To the contrary, the Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. § 20a (Pet. App. 4a), specifically provides that the Secretary "shall take such action as may be appropriate to encourage and enable private persons and corporations (hereinafter referred to as 'concessioners') to provide and operate facilities and services which he deems desirable for the accommodation of visitors in areas administered by the National Park Service". This provision emphasizes that Congress intends for private persons and not the Federal Government to provide the services in dispute herein.

The Act of August 8, 1953, 67 Stat. 495, 16 U.S.C. § 1b (reproduced in Appendix "A" hereto), highlights the Secretary's lack of authority to perform the contemplated operation. This Act specifically authorized the Secretary to operate a for-hire motor carrier service for his employees at the Carlsbad Caverns National Park in New Mexico. The legislative history thereof clearly indicates that prior to 1953 the Secretary had no authority to perform any for-hire transportation operations in the national parks.

In a letter of July 24, 1953, to the Chairman of the Senate Committee on Interior and Insular Affairs, the Interior Department made the following statement in its legislative comments on H.R. 1524, the bill enacted on August 8, 1953:

> This proposed legislation is designed to provide essential housekeeping authority that is needed to manage efficiently the national park system. The provisions

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controlling here. Moreover, it is incorrect for the reasons explained in this argument. Even if correct, however, the application thereof would seem to be limited to the peculiar circumstances in which the Federal property involved is not accessible by land.

> of this bill are limited to those matters that are important in the management of that system and are founded upon many years of experience in that field. . . *It is important that our administrative authority in this field keep pace with our responsibilities.* [Emphasis added.] 1953 U.S. Code Cong. andAdm. News, pp. 2241-42.

It is also noteworthy that the Act of August 8, 1953, specifically prohibited the Secretary from performing for-hire transportation services "if adequate transportation facilities are available . . . by any common carrier at reasonable rates. . .".

Universal has pointed to no enactment subsequent to 1953, and Transit has found none, by which the Secretary has been given any additional authority to perform for-hire transportation operations for either employees or visitors.

In passing, the recent legislative history of the National Visitor Center Facilities Act of 1968, Public Law 90-264 (H.R. 12603), approved March 12, 1968, 82 Stat. 43 (1968 U.S. Code Cong. & Adm. News, pages 403-07), sheds additional light on this question of the Secretary's statutory authority.

As initially introduced, H.R. 12603 contained language in Section 5 which specifically directed the Secretary to provide transportation of visitors by the United States in the Mall area. Such language, however, was deleted from the bill as reported by the House Committee on Public Works, and as later passed by the House, which substituted therefor a requirement that the Secretary report to the Congress by January 15, 1968, on the results of a complete study of the problems of transporting visitors along the Mall and its vicinity. (House Report No. 810 of the 90th Congress, dated October 23, 1967, page 5.)

In commenting to the Senate Committee on Public Works on H.R. 12603 as passed by the House, the following recommendations were made by the Department of the Interior:

> The Department's authority to provide an interpretive transportation service for visitors along the Mall has recently been questioned in the Federal courts of the District of Columbia. We believe, however, that the issue is one of legislative policy that should be decided by legislation rather than by awaiting the conclusion of costly litigation. We believe that the Department has authority to provide such service and that the enactment of legislation would clarify our existing authority and might make continuation of the litigation unnecessary. If the final decision in the pending litigation should be against the Department, we believe that legislation will be needed to give the Department such authority, and since the authority is needed now the Department should not be required to await the outcome of the litigation. . .
>
> In order to have the most effective interpretive program for visitors to the Nation's Capital, we believe the bill should confirm the Secretary of the Interior's authority to provide an interpretive transportation service along the Mall (an authority which we believe presently exists but which has been challenged), and also grant authority to provide such service between the Mall and the National Visitor Center and between other areas administered by the National Park Service within the District of Columbia and its environs, including any additional visitor facilities that may be established in the future. We therefore recommend that the following section be added to the bill to give the Secretary this broader authority . . .[13]

The deletion of Section 5 of H.R. 12603 as introduced and the subsequent failure of the Congress to adopt the

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[13] Letter of December 26, 1967 from Stanley A. Cain, Acting Director of the Department, to Chairman Randolph of the Senate Committee on Public Works, Senate Report No. 959 of the 90th Congress, accompanying H.R. 12603, dated February 5, 1968, pages 9-10; 1968 U.S. Code Cong. & Adm. News, pages 449-50.

recommendations of the Department of the Interior are strong evidence of the continuing Congressional intent to withhold authority from the Secretary to perform transportation for-hire in the national parks as a governmental function.[14]

III.

THE CONGRESSIONAL FRANCHISE GRANTED TO TRANSIT PROTECTS IT AGAINST THE FOR-HIRE TRANSPORTATION OPERATION WHICH UNIVERSAL PROPOSES TO PERFORM IN THE DISTRICT.

For the most part Universal's argument on pages 44-50 is an attempt to support the conclusions of the District Court, found at page 111 of the Appendix, that the protective provisions of Transit's Franchise, Act of July 24, 1956, 70 Stat. 598 (Pet. App. 36a-48a), are not applicable to the operation proposed by Universal. Perhaps the best way to discuss this argument is, at the outset, to summarize the findings of the District Court on each of the pertinent sections of the Franchise:

1. Section 1 grants Transit a franchise to operate a "mass transportation" system within the District of Columbia and between the District and nearby suburbs. The District Court found that only the "mass movement of the public of Washington, D. C." was the subject of Congressional protection.

2. Section 3 prohibits the establishment in the District of a "competitive" bus line which runs over a "given route on a fixed schedule" without certification by the PUC. The District Court found that it is difficult to characterize Universal's proposed operation as proceeding over such route on such schedule

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[14] Cf. the Alaska Railroad Act, Act of March 12, 1914, 38 Stat. 305, as amended, 48 U.S.C. § 301 and Executive Order No. 3861, June 8, 1923, 48 C.F.R. § 5.1, under which the Secretary is specifically authorized to engage in the transportation of passengers for hire.

or as being in any way competitive with the "fundamental function" of Transit.

3. Section 6 authorizes Transit to engage in special charter or sightseeing services. The District Court found that Transit's sightseeing and charter operations within the Mall are conducted under "separate and unprotected authority".

A careful analysis of each of these three items will illustrate that the Congressional intent is much broader than the Court's construction thereof. Beginning with Section 1, the District Court has defined "mass transportation" to be synonymous with the "mass movement of the public of Washington, D. C.", meaning, presumably, residents of the District. There is absolutely nothing in this section which indicates that the Congress intended Transit's Franchise to protect the movement of only a limited class of passengers, residents of the District, as opposed to the movement of all classes of passengers in the District, visitors and commuters as well as residents. Quite the contrary, there is every reason to believe that Congress intended the words "mass transportation" in the Franchise to have as broad an application and construction as the words "mass transit" in the consent legislation to the Compact.

From a strictly practical standpoint the limitation imposed by the District Court would be impossible to apply. As common carrier of passengers, Transit must serve all persons in the District who tender the proper fare for an intra-District movement. It cannot seek to determine which of such persons are visitors or commuters and not residents.

Skipping for the moment the language of Section 3 and going to the language of Section 6, the District Court found that Transit's sightseeing and charter operations are not protected by the Franchise. Apparently, the District Court believed that the very fact of a separate reference to sightseeing operations in Section 6 evidenced a Congressional intent to omit such operations from the protection of the Franchise. There is nothing in Section 1 or Section 6, how-

ever, suggesting that a sightseeing operation is not also a "mass transportation" operation. In view of the fact that Transit's sightseeing operations, like those proposed by Universal, are made available to millions of visitors annually attracted to the Mall, it would seem clear that such operations are a form of "mass transportation" in the District.

While it is certain, as discussed below, that the protection granted Transit operates only against a competitive service running "over a given route on a fixed schedule", this does not mean conversely that the Franchise protects only the portion of Transit's service running "over a given route on a fixed schedule". In terms of lost passengers and revenues, the competitive impact on Transit is not in any way changed by the fact that its existing service being duplicated is a sight-seeing operation as distinguished from a regular route operation.

Turning now to Section 3 of the Franchise, the District Court found that Universal's proposed service would not operate "over a given route on a fixed schedule" and would not compete with Transit's "fundamental function", the latter phrase apparently referring to Transit's extensive regular route service traversing the Mall area.[15] Let us consider each of these findings separately.

The District Court apparently based its finding with respect to the "given" character of Universal's route on two factors: that the Secretary has not designated a route and that the contract specifies that service will be provided "along such routes as may be approved by the Secretary". It is submitted that the first factor is erroneous and the second factor is immaterial.

The fact that the Secretary has designated a route is evidenced by the statement of Universal's Vice President

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[15] Transit operates some 20 regular routes over the major streets in the Mall in addition to its Mall sightseeing operations (App. 60, 117-18).

enumerating the 11 points of interest it will serve over a route "essentially the same as that used by the National Park Service during their six week experiment in 1966" (App. 11-12). A map of the "Shuttle Tour Route" accompanied his statement (App. 16). Confirmation of the Secretary's designation of this particular route is found in a news release of the Department of the Interior (App. 21).

Moreover, it is clear that shuttle service as well as all-day tickets will be provided (App. 12, 22). Surely, it must be obvious that unless Universal intends to operate a taxi service with its 83-seater trams, shuttle and all-day services entail the operation of a "given" or established route. Otherwise, a passenger getting off at a particular point would never know in advance how long he would have to wait there before another tram might come by, if at all.

Ironically, the District Court itself recognized the real character of Universal's route. In setting out the facts, the Court refers to the "prescribed" route to be operated by Universal and describes it in detail as follows (App. 100):

> . . . East out of the Monument grounds through the Mall via Jefferson and Adams Drives to 2nd Street; briefly north on 2nd Street to connect with Washington Drive; west through the Mall by Washington and Madison Drives to the Monument grounds; south through Park land, on the west side of the Bureau of Engraving and Printing; then continuing to and encircling the Jefferson Memorial; thereafter by way of Ohio Drive and 23rd Street to Lincoln Memorial; passing between the Reflecting Pool and the Memorial; then via Beacon Drive to Constitution Avenue and east to the Ellipse; circling the Ellipse and returning through the Monument grounds to the starting point.

The fact that the Secretary must approve or can change Universal's route in no way alters the "given" character thereof. Once his approval is granted or once he orders a change, the "approved" or "changed" route becomes estab-

lished insofar as both Universal and the public are concerned. By comparison under PUC, ICC and Commission procedures motor common carrier routes and schedules are always subject to change, generally initiated by the carriers and approved by the commissions, in order to accommodate the changing needs of the public.

Universal's schedule of operations is set forth in Section 6 of the contract (App. 75). This section requires that Universal operate three trips per hour within the first four months of operation and a minimum of twelve trips per hour within the first year of operation. It is also required that Universal's service be available every day of the year except Christmas Day between the hours of 9:00 a.m. and 10:00 p.m. from April 15 through Labor Day and between the hours of 9:30 a.m. and 5:00 p.m. the rest of the year. It is submitted that Universal's schedule of operations is thereby so substantially established as to constitute the "fixed" character described in Section 3 of the Franchise. The fact that the Secretary must approve Universal's schedule does not change this fundamental character, as discussed above in connection with the Secretary's approval of Universal's route.

With regard to the "competitive" effect which Universal's proposed operation will have on Transit's existing service, the District Court found that such competition will exist only with respect to Transit's sightseeing services which are not entitled to the protection of Section 3 of the Franchise. Such finding is erroneous because it completely ignores the unrefuted testimony that Transit will lose approximately $150,000 in revenues from its extensive regular route operations traversing the Mall (App. 61), which operations even the District Court acknowledged are entitled to protection. (App. 111). Surely, visitors to Washington who now use Transit's regular routes to travel between points on the Mall, as for example from the Capitol to the White House or the National Gallery of Art, will be able to use Universal's shuttle service instead (App. 117).

Furthermore, contrary to the finding of the District Court, Transit's sightseeing operations on the Mall are also entitled to the protection of Section 3 of the Franchise. As noted previously, such sightseeing operations clearly are "mass transportation" in nature and Section 3 is not limited in application to competition solely with Transit's regular routes.[16]

In this connection, it should be emphasized that Section 3 of the Franchise followed almost word for word the language of Section 4 of the so-called Merger Act of January 14, 1933, 47 Stat. 760, D. C. Code § 44-201 (reproduced in Appendix "A" hereto). Accordingly, it would appear that Congress has thereby ratified the court decisions which defined the scope of the protection afforded by Section 4 of the Merger Act. *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 114-15 (1939). One such decision held that:

> The unequivocal language of the statute is sufficiently comprehensive to cover all kinds of operations of a competitive bus line, be they intrastate or interstate. *Oriole Motor Coach Co. v. Public Utils. Com'n.*, 111 F. Supp. 621, 622 (D.C. D.C. 1953).

When it is considered that Universal's proposed service will duplicate Transit's existing sightseeing service on the Mall in the following four fundamental respects, it is obvious that the two services will be competitive:

1. Operating over substantially the same streets, both inside and outside the Mall;

2. Providing a service attractive to the same class of persons—tourists;

3. Employing guides particularly knowledgeable about local points of interest;

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[16] The argument that the Franchise protects only Transit's regular routes was recently rejected by the United States District Court for the District of Columbia, in *D.C. Transit System, Inc. v. Stewart L. Udall, et al.*, Case No. 1122-68 (May 27, 1968), in granting a motion for preliminary injunction against the operation by the Government of an interpretive service similar to that proposed by Universal herein.

4. Providing service to essentially the same points of interest.

The impact of such competition on Transit's existing sightseeing services on the Mall, individual and group, was estimated at over a million dollars annually (App. 61).

In view of the foregoing, irrespective of any requirements of the Compact, Universal's proposed operation is precluded by the Franchise until a requisite certificate of public convenience and necessity has been issued by the Commission. The fact that the protective provisions of Transit's Franchise are in no way impaired by the Compact has recently been recognized in *D. C. Transit System, Inc. v. Washington Met. Area Tr. Com'n.*, 376 F.2d 765, 769 (D.C. Cir. 1967).

Several of the statements made by Universal warrant passing reference. On page 46 Universal suggests that its service is "unique". On the contrary, several carriers, including Transit, now provide substantially similar interpretive services (App. 55, 65).

On page 47 Universal suggests that Section 6 of the Franchise becomes merely a "redundant provision" under Transit's contention that sightseeing services are embraced within the term "mass transportation". This section is not redundant at all. Without it, there would have been doubt as to whether the Congress intended to allow Transit to perform services beyond the Washington Metropolitan Area and subject to the laws and regulations of the "municipalities or political subdivisions of the States in which such service is to be performed, and with applicable provisions of the Interstate Commerce Act and rules and regulations prescribed thereunder".

On pages 48-49 Universal argues that Transit's contention that the proposed service will operate "over a given route on a fixed schedule" flatly contradicts the Commission's administrative practice of issuing certificates describing sightseeing services as "irregular route" or "special" operations. Here Universal is seeking to establish a mutually exclusive relationship, suggesting that a service cannot be both "sight-

seeing" and "regular route" in nature. This is fallacious reasoning.

It is true that sightseeing or irregular route operations are normally distinguishable from regular route operations in two respects:

1. The former generally operate according to prearranged schedules but may vary such schedules without Commission permission (or not run a particular trip if the demand therefor is inadequate); the latter must operate strictly according to schedule irrespective of the public demand, the Commission's permission being a prerequisite to a scheduling change.

2. The former generally follow an established route but may vary such route without Commission permission; the latter must follow their established routes, making changes therein only after Commission permission has been obtained.

Such general distinction does not mean, however, that a sightseeing service cannot be operated in such a manner as to take on the operational characteristics of a "regular route". See, for example, *Asbury Park v. Bingler*, 62 M.C.C. 731, affirmed at 132 F. Supp. 792 and 350 U.S. 921, in which the ICC held that an operation conducted under "sightseeing or pleasure" authority could duplicate a regular route operation to such an extent as to require regular route authority.

Finally, on page 49 Universal suggests that the provisions of Section 6 of the contract refer to minimum equipment requirements and not to schedule requirements. The very purpose of imposing an equipment requirement is to assure that a carrier adequately performs its schedule of operations. Universal can call the provisions of Section 6 whatever it wants; the fact remains that under such provisions Universal's minimum schedule of operations has been "fixed".

IV

D. C. TRANSIT SYSTEM, INC. HAS STANDING TO SEEK INJUNCTIVE RELIEF.

It is true that Transit can be excluded from the Mall by the Secretary. This fact does not negate Transit's standing to enjoin any arbitrary or discriminatory exercise by the Secretary of such exclusionary power or, as here, to enjoin the Secretary from engaging in common carrier services in excess of his statutory authority and in violation of Transit's Franchise and Certificate of Public Convenience and Necessity No. 5.

Transit's Franchise and Certificate No. 5 are valuable property rights which cannot be taken or diminished without regard to due process of law. *Monongahela Nav. Co. v. United States*, 148 U.S. 312 (1892); *Frost v. Corporation Commission*, 278 U.S. 515 (1929); *Movers Conference of America v. United States*, 205 F. Supp. 82 (1962); and *Rock Island Motor Transit Co. v. United States*, 90 F. Supp. 516 (1949), *rev'd on other grounds*, 340 U.S. 419 (1950). Of particular relevancy, in *Capital Transit Co. v. Safeway Trails, Inc.*, 92 U.S. App. D.C. 20, 201 F.2d 708, 709 (1953), the Court held that the provisions of Section 4 of the Merger Act, *supra*, gave Transit's predecessor "a status which is legally protectible".

V

THE POSITION OF THE UNITED STATES IS NOT WELL-FOUNDED.

In essence, the Government's Memorandum contends that a local agency, administering a law designed solely to foster commuter service within the Metropolitan District, has no authority over national park areas which have always been under the exclusive jurisdiction of the Service. The Government thus pictures an irreconcilable conflict between local and national laws as well as local and national interests, with the former negating the latter. To the extent that such contention merely restates the arguments contained in Universal's brief which have already been covered herein, further discussion is unnecessary. However, it would seem desirable to comment briefly on a few statements made in the Government's Memorandum for purposes of clarification.

On page 3 is it suggested by the Government that, since the Congress has consistently maintained a basic dichotomy between municipal and national affairs in legislating with respect to the District of Columbia, it could never have intended the Commission to exercise jurisdiction over motor carrier operations on Federal property. The following language in the Preamble to the Compact fully refutes such suggestion:

> Whereas said compact adequately protects the *national* interest in mass transit service in the metropolitan area of the Nation's Capital and properly accommodates the *National* and State interests in and obligations toward mass transit in the metropolitan area. . . . (D.C. Code § 1-1410, emphasis added.)

On page 10 the Government states that Universal's "incidental" movement of visitors is "wholly extraneous" to the purpose for which the Commission was created. In other words, the suggestion here is that a sightseeing service to be offered out-of-state and foreign visitors coming to Washington has no real effect on the Commission's responsibility to

improve transit service and alleviate traffic congestion in the entire Metropolitan District. It would seem perfectly obvious that any for-hire transportation service, whether or not sightseeing in nature, which is operated daily in the very heartland of the Metropolitan District and which involves the movement of millions of passengers annually is inseparably related to the general transit and traffic problems of the District.

On page 12 the Government suggests the likelihood that the Congress believed the "police powers" language in Section 3 of the consent legislation was "as effective to maintain the status quo as was the use of the term 'authority and responsibility of the Secretary'". If the Government is herewith contending that the "police powers" proviso in the consent legislation merely preserved the then-existing, non-exclusive authority of the Secretary over national parks, Transit wholeheartedly agrees.

It would appear, however, that the language recommended by the Secretary was designed to go further—to resurrect the once "exclusive" character of his jurisdiction over national parks in the Metropolitan District—and therefore the intent underlying the Congressional failure to adopt such language cannot, as suggested by the Government, be reasonably equated with the dismissal of an "unnecessary refinement".

The enactment of the National Visitor Center Facilities Act of 1968, *supra*, provides further insight into such Congressional intent. As noted fully on pages 448-50 of the 1968 U.S. Code Cong. & Adm. News, the bill initially contained a provision directing the Secretary to provide transportation service on the Mall. When this provision was deleted by the House, the Secretary sought an amendment which would have provided that the operation of a transportation service on the Mall was under the "sole and exclusive regulation of the Secretary". The Congress, without any explanatory language in the legislative history, rejected

such amendment and provided instead for the submission of a report, deemed entirely unnecessary by the Secretary, on transportation conditions on the Mall. Such rejection surely represents not the dismissal of an unnecessary refinement but the continuation of a Congressional intent to include national park areas in the Metropolitan District within the jurisdiction of the Commission.

On pages 16 and 17 the Government poses the threat that the Secretary's administration of the national parks will be "thwarted" and "frustrated" by the Commission's exercise of jurisdiction over the Mall. Such threat would seem to be entirely unwarranted. As a practical matter, it is only reasonable to expect that two agencies exercising concurrent jurisdiction will establish a working relationship pervaded by a spirit of cooperation. It simply is in their own best interests to do so; for in the sense that the Commission can refuse to certificate a "concessioner" of the Secretary, the Secretary can refuse to allow a carrier certificated by the Commission to operate on parkland in the District. Under the circumstances, the Commission and the Secretary will doubtlessly give most careful and sympathetic consideration to each other's determination of a public need. Should such consideration result in a denial, judicial review is readily available to assure the reasonableness thereof.

On pages 20-21 it is comforting to note that at last the Government concedes that the ICC has limited jurisdiction over operations in national park areas. It is difficult to understand, however, why the Government suggests that it is not "appropriate" for the Commission, successor to the authority of the ICC in the Metropolitan District, to exercise similar jurisdiction. Contrary to the Government's suggestion, this is clearly not a Commission "effectively controlled by representatives of Maryland and Virginia". Under Article VI of the Compact (Pet. App. 15a), no action of the Commission relating to or affecting operations solely within the District of Columbia can be effective without the concurrence of the member representing the District.

The answer to the Government's query as to how the Commission could have been given greater authority than the ICC over national parks in the District is obvious; the Commission inherited not only the ICC's jurisdiction thereover but also that exercised by the PUC.

Finally, on page 22, the Government asks how the Franchise can be applicable to Universal's proposed operation but not to the competitive sightseeing operations conducted by the other respondents. Here again the answer is obvious; only Universal will operate its services "over a given route on a fixed schedule". While the services of the other respondents generally follow a particular route and schedule, they can vary same without approval. Universal, by contrast, must get the approval of the Secretary to make any such changes. Moreover, the Franchise was granted to Transit subject "to the rights to render service within the Washington Metropolitan Area possessed at the time . . . by other common carriers of passengers" (Section 1, Pet. App. 37a). The Mall sightseeing operations of all the other respondents were in existence prior to the grant of Transit's Franchise in 1956.

CONCLUSION

For the foregoing reasons, the order of the Court of Appeals of June 30, 1967 should be affirmed.

Respectfully submitted,

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Attorneys for D. C. Transit System, Inc.

APPENDIX A

(STATUTES NOT PRINTED IN APPENDIX TO THE BRIEF FOR PETITIONER)

ACTS RELATING TO JURISDICTION AND AUTHORITY OF NATIONAL PARK SERVICE

Act of September 25, 1890, 26 Stat. 478, 16 U.S.C. § 43.

Sequoia National Park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury of all timber, mineral deposits, natural curiosities or wonders within said park, and their retention in their natural condition. * * *

Act of March 2, 1899, 30 Stat. 994, 16 U.S.C. § 92.

Mount Rainier National Park shall be under the exclusive control of the Secretary of the Interior. In addition to the powers and duties enumerated in section 3 of this title, not inconsistent with this section, he shall make regulations providing for the preservation from injury or spoliation of all timber, mineral deposits, natural curiosities, or wonders within said park, and their retention in their natural condition. * * *

Act of January 9, 1903, 32 Stat. 765, 16 U.S.C. § 142.

Wind Cave National Park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be to prescribe such rules and regulations and establish such service as he may deem necessary for the care and management of the same. * * *

Act of June 29, 1906, 34 Stat. 617, 16 U.S.C. § 112.

Mesa Verde National Park shall be under the exclusive control of the Secretary of the Interior. In addition to the

duties and powers enumerated in section 3 of this title not inconsistent with this section, he shall establish such service as he may deem necessary for the care and management of the same. Such regulations shall provide specifically for the preservation from injury or spoliation of the ruins and other works and relics of prehistoric or primitive man within said park. * * *

Act of May 11, 1910, 36 Stat. 354, 16 U.S.C. § 162.

Glacier National Park shall be under the exclusive control of the Secretary of the Interior. In addition to the powers and duties enumerated in section 3 of this title not inconsistent with this section, he shall make and publish such rules and regulations not inconsistent with the laws of the United States as he may deem necessary or proper for the care, protection, management, and improvement of the same, which regulations shall provide for the preservation of the park in a state of nature so far as is consistent with the purposes of section 161 of this title, and for the care and protection of the fish and game within the boundaries thereof. * * *

Act of August 8, 1953, 67 Stat. 495, 16 U.S.C. § 1b.

In order to facilitate the administration of the National Park System and miscellaneous areas administered in connection therewith, the Secretary of the Interior is authorized to carry out the following activities, and he may use applicable appropriations for the aforesaid system and miscellaneous areas for the following purposes:

Emergency assistance

1. Rendering of emergency rescue, fire fighting, and cooperative assistance to nearby law enforcement and fire prevention agencies and for related purposes outside of the National Park System and miscellaneous areas.

Utility facilities: erection and maintenance

2. The erection and maintenance of fire protection facilities, water lines, telephone lines, electric lines, and other utility facilities adjacent to any area of the said National

Park System and miscellaneous areas, where necessary to provide service in such area.

Transportation of employees of Carlsbad Caverns National Park; rates

3. Transportation to and from work, outside of regular working hours, of employees of Carlsbad Caverns National Park, residing in or near the city of Carlsbad, New Mexico, such transportation to be between the park and the city, or intervening points, at reasonable rates to be determined by the Secretary of the Interior taking into consideration, among other factors, comparable rates charged by transportation companies in the locality for similar services, the amounts collected for such transportation to be credited to the appropriation current at the time payment is received: *Provided*, That if adequate transportation facilities are available, or shall be available by any common carrier, at reasonable rates, then and in that event the facilities contemplated by this paragraph shall not be offered.

Utility services for concessioners; reimbursement

4. Furnishing, on a reimbursement of appropriation basis, all types of utility services to concessioners, contractors, permittees, or other users of such services, within the National Park System and miscellaneous areas; *Provided*, That reimbursements hereunder may be credited to the appropriation current at the time reimbursements are received . . .

Supplies and rental of equipment; reimbursement

5. Furnishing, on a reimbursement of appropriation basis, supplies, and the rental of equipment to persons and agencies that in cooperation with, and subject to the approval of, the Secretary of the Interior, render services or perform functions that facilitate or supplement the activities of the Department of the Interior in the administration of the National Park System and miscellaneous areas: *Provided*, That reimbursements

hereunder may be credited to the appropriation current at the time reimbursements are received.

WASHINGTON METROPOLITAN AREA TRANSIT REGULATION COMPACT, AS APPROVED BY ACT OF SEPTEMBER 15, 1960, 74 STAT. 1051, D.C. CODE (1967 ED.) §§ 1-1415 and 1416

* * *

A. Consent Legislation

Sec. 6. Jurisdiction is hereby conferred (1) upon the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the District of Columbia Circuit, respectively, to review orders of the Washington Metropolitan Area Transit Commission as provided by section 17, article XII, title II, of the Washington Metropolitan Area Transit Regulation Compact, and (2) upon the United States district courts to enforce the provisions of said title II as provided in section 18, article XII, title II, of said Compact.

Sec. 7. (a) The right to alter, amend, or repeal this Act is hereby expressly reserved.

(b) The Washington Metropolitan Area Transit Commission shall submit to Congress copies of all periodic reports made by the Commission to the Governors, the Commissioners of the District of Columbia and/or the Legislatures of the compacting States.

(c) The Congress or any committee thereof shall have the right to require the disclosure and furnishing of such information by the Washington Metropolitan Area Transit Commission as is deemed appropriate by the Congress or any of its committees. Further, Congress or any of its committees shall have access to all books, records and papers of the Washington Metropolitan Area Transit Commission as well as the right of inspection of any facility use, owned, leased, regulated or under the control of said Commission.

OTHER ACTS

Act of March 3, 1925, 43 Stat. 1126, D.C. Code § 40-613

Nothing contained in this chapter shall be construed to interfere with the exclusive charge and control prior to March 3, 1925, committed to the Director of the National Park Service over the park system of the District, and he is hereby authorized and empowered to make and enforce all regulations for the control of vehicles and traffic, and limiting the speed thereof on roads, highways, and bridges within the public grounds in the District, under his control, subject to the penalties prescribed in this chapter. (Mar. 3, 1925, 43 Stat. 1126, ch. 443,

Act of February 27, 1931, 46 Stat. 1426, D.C. Code § 40-603(e)

(e) The commissioners may in the administration of this chapter, section or any provision of the Traffic Acts for the District, exercise any power or perform any duty conferred on them by this chapter through such officers and agents of the District as the commissioners may designate. The commissioners are further authorized and empowered to make, modify, repeal, and enforce reasonable rules and regulations in respect to the movement of traffic, speed, length, weight, height, width, routing, and parking of vehicles, and the establishment and location of hack stands: *Provided*, That the commissioners shall establish and locate parking areas in the vicinity of governmental establishments for use only by members of Congress and governmental officials when on official business: *Provided further*, That as to all common carriers by vehicle which enter, operate in, or leave the District of Columbia, the power to route such vehicles within the District of Columbia, to regulate their equipment other than that specifically named elsewhere in

this chapter, to regulate their schedules and their loading and unloading, to locate their stops, and all platforms and loading zones and to require the appropriate marking thereof, is vested in the Public Service Commission of the District of Columbia: *Provided further*, That whenever any order, rule, or regulation of the Public Service Commission shall be made relative to the routing of common carrier vehicles, to the location of their stops, to the establishment or change in location of platforms, loading zones, or other spaces on the public highway to be reserved for any purpose whatsoever, or to the appropriate marking thereof, or whenever any order, rule, or regulation of the District commissioners shall be made which affects such routing, stops, platforms, zones, or spaces, said order, rule, or regulation shall, prior to promulgation, be referred to a joint board to be composed of the commissioners of the District of Columbia and the members of the Public Service Commission, which is hereby authorized and created. Such joint board may, by the affirmative action of any three members thereof, adopt rules and regulations which, when promulgated, shall be binding and shall have the full force and effect of law, and the engineer commissioner shall have but one vote. Any of said rules and regulations, after reasonable trial and within a reasonable time, may be changed by the joint board upon the request of the commissioners of the District of Columbia or of the Public Service Commission.

Act of January 14, 1933, 47 Stat. 760, D.C. Code § 44-201

Competing lines—Certificates of convenience and necessity.

No competitive street railway or bus line, that is, bus or railway line for the transportation of passengers of the character which runs over a given route on a fixed schedule, shall be established without the prior issuance of a certificate by the Public Service Commission of the District of Columbia to the effect that the competitive line is necessary for the convenience of the public.

Act of August 9, 1935, 49 Stat. 543, Part II of the Interstate Commerce Act

Section 203(b)4, 49 U.S.C. § 303(b)4

(b) Nothing in this part, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be contrued to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; or (2) taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments; or (4a) motor vehicles controlled and operated by any farmer when used in the transportation of his agricultural (including horticultural) commodities and products thereof, or in the transportation of supplies to his farm; or (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined;

Section 209(a)(1), 49 U.S.C. sec. 309(a)(1)

(a) (1) Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce or any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: * * *

• • • *Provided, further*, That nothing in this part shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national monument of the United States.

APPENDIX B

PUBLIC UTILITIES COMMISSION OF
THE DISTRICT OF COLUMBIA

Order No. 1623.

August 5, 1937.

IN THE MATTER OF

An investigation of the transportation requirements of the District of Columbia for all street railway and bus service and facilities of the CAPITAL TRANSIT COMPANY to determine route changes, extensions of service, abandonments, physical changes in facilities, locations of stops, safety zones, and loading platforms, and such other matters as may be pertinent in order that proper and adequate service may be provided by said company within the District of Columbia.

P.U.C. No. 3085/178.

Part 2.

Abandonment and construction of tracks in the vicinity of Four and One-Half Streets.

AMENDING ORDER NO. 1248 AND CANCELLING ORDER NO. 1355.

IT IS ORDERED:

Section 1. That section (5) of Order No. 1248, as amended by Order No. 1355, be and it is further amended to read as follows:

(5) That the Capital Transit Company be and it is authorized and directed to operate buses over the following route:

From terminal on the south side of P Street, Southwest, east on P Street to 4th Street, north on 4th Street to Washington Drive, west on said drive to

9th Street, north on 9th Street to Pennsylvania Avenue, east on Pennsylvania Avenue to terminal east of 7th Street; from said terminal, east on Pennsylvania Avenue to 4th Street, south on 4th Street to O Street, west on O Street to Water Street, south on Water Street to P Street, east on P Street to terminal.

Section 2.. That terminals be established at the following locations:

South side of P Street, Southwest, beginning 32 ft. west of west curb line of 4th Street and extending west 90 ft.

South side of Pennsylvania Avenue, Northwest, beginning 30 ft. east of east curb line of 7th Street and extending east 60 ft.

Section 3. That Order No. 1355 be canceled.

Section 4. That this order take effect Sunday, August 15, 1937.

A TRUE COPY:
/s/ James L. Martin
Executive Secretary.

By the Commission
JAMES L. MARTIN,
Executive Secretary.

August 10, 1937.

In accordance with the provisions of the Act of Congress approved February 27, 1931, this order has been referred to the Joint Board created by the said Act and has been adopted by said Joint Board.

DAN I. SULTAN
Chairman of the Joint Board.